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IN THE
Supreme Court of the United States

JOSE ANGEL SERNA-GUERRA,
Petitioner
v.
ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Nicolas Bourtin*
Heather H. Volik**
125 Broad Street
New York, New York 10004
(212)558-4000
* Counsel of Record for *Amicus Curiae*. Application to the Supreme Court pending, admission on March 10, 2009.
** Admitted in New York only.
Counsel for National Immigration Project of the National Lawyers Guild.

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF THE *AMICUS CURIAE* 1

STATEMENT OF THE CASE 2

ARGUMENT 5

I. The Fifth Circuit's Incorrect Determination that UUV is a "Crime of Violence" Ignores Supreme Court Precedent and the Legislative History of the Term 5

A. The Court Has Given Guidance on Applying "Crime of Violence" 5

B. The Origin of the Term Gives Further Guidance on its Proper Application 7

II. The Immigrant Community Has Repeatedly Challenged the Fifth Circuit's Holding, Resulting in the Waste of Judicial Resources 12

III. The Fifth Circuit's Decision Affects a Disproportionate Population Because Texas Holds a Large Percentage of Detained Noncitizens 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

CASES

Armendariz-Moreno v. *United States*,
129 S. Ct. 993 (2009) 3

Begay v. *United States*,
128 S. Ct. 1581 (2008) 3, 4

Brieva-Perez v. *Gonzales*,
482 F.3d 356 (5th Cir. 2007) 14

Castillo-Lucio v. *United States*,
129 S. Ct. 993 (2009) 3

Chambers v. *United States*,
129 S. Ct. 687 (2009) 2, 3, 4

De La Paz Sanchez v. *Gonzales*,
473 F.3d 133 (5th Cir. 2006) 14

Griffin v. *State*,
614 S.W.2d 155
(Tex. Crim. App. 1981) 9

Landers v. *State*,
957 S.W.2d 558
(Tex. Crim. App. 1997) 9

Leocal v. *Ashcroft*,
543 U.S. 1 (2004) 6, 7, 14

Musgrave v. *State*,
608 S.W.2d 184
(Tex. Crim. App. 1980) 9

Ramirez v. *Ashcroft*,
361 F. Supp. 2d 650
(S.D. Tex. 2005) 5, 7, 14

Ramirez v. *Gonzales*,
187 Fed. App'x 384
(5th Cir. 2006) 7

Reyes-Figueroa v. *United States*,
129 S. Ct. 998 (2009) 3

Serna-Guerra v. *Mukasey*,
285 Fed. App'x 110 (S.D. Tex. 2008) 3

Serna-Guerra v. *Mukasey*,
298 Fed. App'x 370 (5th Cir. 2008) 3

United States v. *Galvan-Rodriguez*,
169 F.3d 217 (5th Cir. 1999) 11

United States v. *Lee*,
310 F.3d 787 (5th Cir. 2002) 5

United States v. *Magallanes-Nieto*,
95 Fed. App'x 581 (5th Cir. 2004) 14

United States v. *Sanchez-Garcia*,
501 F.3d 1208 (10th Cir. 2007) 7

United States v. *Vidal-Bouche*,
110 Fed. App'x 451
(5th Cir. 2004) 14

STATUTES

8 U.S.C. § 1101(a)(43) 10

8 U.S.C. § 1227(a)(2)(A)(iii) 10

8 U.S.C. § 1252 13

8 U.S.C. § 1362 12

18 U.S.C. § 16 ..... passim

Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7341-49, 102 Stat. 4181 (1988) 10

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440, 110 Stat. 1214 (1996) 11

Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 1001(a), 98 Stat. 1837 (1984) 9

District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, §210, 84 Stat. 473 (1970) 8

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) 11

Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978 (1990) 10

TEX. PENAL CODE ANN. § 31.07 6

OTHER AUTHORITIES

Forrest Wilder, *South Texas Hold 'em,* The Texas Observer, May 5, 2006 15

Hernán Rozemberg, *Immigrant lockup expanding,* San Antonio Express-News, Sept., 26, 2007 15

Juan Castillo, *Deportations from Central and South Texas Hit Record,* Austin-American Statesman, Nov. 7, 2008 15

S. Rep. No. 98-225 (1984), 1984 U.S.C.C.A.N. 3182 9

Suzanne Gamboa, *Advocates decry detention "gold rush,"* The Associated Press State & Local Wire, Feb. 2, 2006 15

U.S. Department of Justice's Executive Office for Immigration Review, FY 2007, Statistical Year Book (April 2008) 13

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER[1]

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

With the consent of the parties pursuant to Rule 37 of the Rules of this Court, the National Immigration Project of the National Lawyers Guild (National Immigration Project) submits this brief as *amicus curiae* in support of the petition for writ of certiorari. The National Immigration Project is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. The National Immigration Project has a substantial interest in the Court's accepting certiorari.

The National Immigration Project provides legal training to the bar and the bench on the immigration consequences of criminal conduct and is the author of *Immigration Law and Crimes* published by Thomson-West. The National

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae* intention to file this brief, and the parties' written consent to the submission of this brief has been filed with the Clerk of Court.

Immigration Project has participated as *amicus curiae* in significant immigration-related cases before this Court, including, among others, *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183 (2007); *United States* v. *Mendoza-Lopez*, 481 U.S. 828 (1987); and *Jean* v. *Nelson*, 472 U.S. 846 (1985). The National Immigration Project has a substantial interest in preventing inconsistent rulings by federal courts of appeals with conflicting applications of the term "crime of violence" in the immigration context.

STATEMENT OF THE CASE

Alone among the courts of appeals, the Fifth Circuit has determined that Unauthorized Use of a Vehicle ("UUV") is a "crime of violence" under Section 16(b) of Title 18 of the United States Code, and has declined to reconsider this decision after challenges by noncitizen claimants over the last several years.[2] The decisions of the Fifth Circuit are especially relevant to noncitizen claimants because the Fifth Circuit, which covers, among other populous states, the State of Texas, contains a large number of the nation's detained immigrants. As a result, the classification of a "crime of violence" is applied incorrectly in one of the most important Circuits in the country and inconsistently throughout the United States. Due to the Fifth Circuit's improper classification of UUV as a "crime

[2] In a concurring opinion in *Chambers* v. *United States*, 129 S. Ct. 687, 694-95 n.2 (2009) Justice Alito noted the Circuit split regarding whether UUV is a "crime of violence."

of violence," noncitizens convicted of UUV in the Fifth Circuit are subject to removal and future inadmissibility for a crime that does not include the elements necessary to present serious risk to people or property. Additionally, the Fifth Circuit itself is divided on this issue, as seen in the *per curium* decision recommending reconsideration and the strong dissent when the Circuit denied a Panel Rehearing. *See Serna-Guerra* v. *Mukasey*, 285 Fed. App'x 110, 114 (5th Cir. 2008) (per curium) ("we urge and recommend that that precedent should be reconsidered and overruled by our *en banc* court"); 298 Fed. App'x 370 (5th Cir. 2008) (Dennis, J., dissenting).

The issue of whether UUV is a "crime of violence" under the sentencing guidelines and 18 U.S.C. § 16(b) was recently raised in three petitions for certiorari. The Court granted, vacated and remanded those cases for decisions consistent with *Begay* v. *United States*, 128 S. Ct. 1581 (2008) and *Chambers* v. *United States,* 129 S. Ct. 687 (2009). *See Armendariz-Moreno* v. *United States,* 129 S. Ct. 993 (2009); *Castillo-Lucio* v. *United States*, 129 S. Ct. 993 (2009); *Reyes-Figueroa* v. *United States*, 129 S. Ct. 998 (2009). In *Begay*, the Court determined that driving while under the influence of alcohol was not a violent felony under the Armed Career Criminal Act (ACCA). *Begay*, 128 S. Ct. at 1583. In *Chambers*, the Court found that failure to report for penal confinement was not a violent felony under ACCA. *Chambers,* 129 S. Ct. at 687. The Court should decline to similarly return this case to the Fifth Circuit for review of the issue in light of *Begay*

and *Chambers* because remanding in this case could cause an extreme hardship for a noncitizen facing removal for UUV.

Noncitizens are not guaranteed legal representation for the various phases of the removal process, making it especially difficult to challenge the incorrect holding of the Fifth Circuit. To the extent the Court agrees that UUV is not a "crime of violence" under the principles announced in *Chambers* and *Begay*, the Court should not require every immigrant facing removal under the Fifth Circuit's erroneous classification to petition the Supreme Court for relief. Such a requirement is a nearly impossible obstacle for the immigrant community at large and will result in an unnecessary waste of judicial resources.

ARGUMENT

I. The Fifth Circuit's Incorrect Determination that UUV is a "Crime of Violence" Ignores Supreme Court Precedent and the Legislative History of the Term

The issue before the Court is a limited one:[3] whether UUV is a "crime of violence" under 18 U.S.C. § 16(b). The answer is plainly no. The term "crime of violence" is not new. It has been defined by the legislature and courts over many years, and the history of the term clearly demonstrates that it was intended to encompass serious crimes with high risk of violence.

A. The Court Has Given Guidance on Applying "Crime of Violence"

Congress defined a "crime of violence" under § 16(b) as:

> any other offense that is a felony and that, by its nature, involves a substantial risk that

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[3] The Fifth Circuit narrowed the determination that UUV is a "crime of violence" under § 16(b), by finding UUV is not a "crime of violence" under the United States Sentencing Guidelines definition of the term. *United States* v. *Lee*, 310 F.3d 787, 791 (5th Cir. 2002); *Ramirez* v. *Ashcroft*, 361 F. Supp. 2d 650, 655 (S.D. Tex. 2005) ("The Fifth Circuit has limited the holding of *Galvan-Rodriguez* to its property aspects and to section 16(b) cases.").

> physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16(b) (2006).

The term "crime of violence" does not apply to all offenses that risk harm, but rather only to serious and violent offenses. *Leocal* v. *Ashcroft*, 543 U.S. 1, 10 n.7 (2004). This Court has stated that, "16(b) plainly does not encompass all offenses which create a 'substantial risk' that injury will result from a person's conduct. The 'substantial risk' in § 16(b) relates to the use of force, not to the possible effect of a person's conduct." *Id.* In *Leocal*, the Court reviewed the term "crime of violence" in relation to Florida's driving-while-under-the-influence ("DUI") statute and the immigration removal laws. *Id.* at 3. Although the Court focused on the element of the *mens rea* in the DUI statute, the Court "ultimately . . . determine[ed] [that] the meaning of the term 'crime of violence' . . . suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses" under 18 U.S.C. § 16. *Id.* at 11.

In contrast, a person may be convicted of UUV, merely by "intentionally or knowingly operat[ing] another's boat, airplane, or motor-propelled vehicle without the effective consent of the owner." TEX. PENAL CODE ANN. § 31.07. As with DUI, the elements of UUV do not place that offense in the "category of violent, active crimes" that should

be considered a "crime of violence." *See Leocal*, 543 U.S. at 11.

Nevertheless, after *Leocal*, the Fifth Circuit was asked to revisit the question in a case where the District Court had concluded that the Fifth Circuit's precedent did not conflict with *Leocal*. *Ramirez* v. *Ashcroft*, 361 F. Supp. 2d 650, 657 (S.D. Tex. 2005). In doing so, the District Court focused on the hypothetical possibility of a perpetrator "breaking into the vehicle, stripping the vehicle, or vandalizing the vehicle in order to use it without the owner's consent" in affirming that UUV was still a "crime of violence." *Id.* The Fifth Circuit implicitly adopted that reasoning, refusing to address the issue and dismissing the appeal for lack of jurisdiction. The Fifth Circuit noted that "[t]his court's pre-*Leocal* jurisprudence was consistent with *Leocal*'s holding related to 18 U.S.C. § 16(b)." *Ramirez* v. *Gonzales*, 187 Fed. App'x 384 (5th Cir. 2006).

No other Court of Appeals has so held. In fact, the Tenth Circuit recently concluded the opposite, holding that UUV is not a "crime of violence." *United States* v. *Sanchez-Garcia*, 501 F.3d 1208, 1214 (10th Cir. 2007) (finding unlawful use of means of transportation is not a "crime of violence" under 16(b)). A Circuit split thus exists and should be resolved.

B. The Origin of the Term Gives Further Guidance on its Proper Application

The Fifth Circuit has failed to recognize that the term "crime of violence" was added by the

legislature with a long history of use and interpretation. Indeed, the term comes not from the common law, but rather, from the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, §210, 84 Stat. 473, 604 (1970). The 1970 Act defined the term as including:

> murder, forcible rape, carnal knowledge of a female under the age of sixteen, taking or attempting to take immoral, improper, or indecent liberties with a child under the age of sixteen years, mayhem, kidnapping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense, assault with a dangerous weapon, or an attempt or conspiracy to commit any of the foregoing offenses . . . if the offense is punishable by imprisonment for more than one year.

Id.

In 1984, 18 U.S.C. § 16, adopted the current language as part of the Comprehensive Crime Control Act of 1984 (1984 Act), Pub. L. No. 98-473, § 1001(a), 98 Stat. 1837, 2136 (1984). The Senate report noted that the term "crime of violence" should have "essentially the same" meaning as the 1970 Act. *See* S. Rep. No. 98-225 (1984), at 20, as reprinted in 1984 U.S.C.C.A.N. 3182, 3203. However vague the definition appears, the history of the term in the criminal law statutes clearly show that the term should only be used for serious violent crimes. The term should be applied to violent acts as described under 1970 Act.

UUV is not "essentially the same" as "murder, forcible rape. . .robbery or burglary." *See* S. Rep. No. 98-225 (1984), at 20, as reprinted in 1984 U.S.C.C.A.N. 3182, 3203; The Bail Reform Act. In fact, Texas courts have found UUV to be a lesser included offense of both theft and aggravated robbery. *See, e.g., Landers* v. *State*, 957 S.W.2d 558, 559 (Tex. Crim. App. 1997) *overruled on other grounds*, *Ex parte Cavazos,* 203 S.W.3d 333, 338 (Tex. Crim. App. 2006); *Musgrave* v. *State,* 608 S.W.2d 184, 190 (Tex. Crim. App. 1980) (noting that *Neely* 571 S.W.2d 926 (Tex. Crim. App. 1978) found UUMV was a lesser included offense of theft*), overruled on other grounds*, *Gardner* v. *State,* 780 S.W.2d 259 (Tex. Crim. App. 1989); *Griffin* v. *State,* 614 S.W.2d 155, 158 n.4 (Tex. Crim. App. 1981) (stating that UUMV is a lesser included offense of theft, and theft is a lesser included offense of aggravated robbery).

Today, a noncitizen is subject to removal and future inadmissibility if convicted of an aggravated felony, such as a "crime of violence." *See* 8 U.S.C. § 1227(a)(2)(A)(iii)(2000) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."); 8 U.S.C. § 1101(a)(43) ("The term 'aggravated felony' means . . . crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least one year."). The severe consequences of being convicted of an aggravated felony were increased over time, in response to rising concerns of an increase of noncitizens caught in the criminal justice system.

Starting in the 1980s, immigration law increasingly began to address the criminal convictions of noncitizens. In 1988, Congress enacted legislation that created additional restrictions and penalties for noncitizens convicted of aggravated felonies. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7341-49, 102 Stat. 4181, 4469-73 (1988). An aggravated felony was limited to the severe offenses of "murder, drug trafficking . . . [of] firearms or destructive devices" or attempt of such crimes. *Id.* at § 7342.

In 1990, the term "crime of violence" was added as a category of aggravated felony offenses. However, Congress failed to enumerate the crimes that the term should encompass. Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048 (1990). The 1990 Act defined a "crime of violence" in relation to 18 U.S.C. § 16. In 1996, Congress again addressed the removal of criminal

noncitizens, eliminating potential discretionary relief formerly available, and limiting future admissibility of a noncitizen found to be an aggravated felon. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440, 110 Stat. 1214, 1276-79 (1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

Since 1999, the Fifth Circuit has applied the category of "crime of violence" under 18 U.S.C § 16(b) to UUV, a crime that does not rise to the level of violent actions such as rape, murder, kidnapping or arson. *See United States* v. *Galvan-Rodriguez,* 169 F.3d 217 (5th Cir. 1999). The court compared UUV to burglary of a vehicle and determined that it was similar enough to warrant the application of 18 U.S.C. § 16, ignoring the differences in the statutory language of burglary. *Galvan-Rodriguez,* 169 F.3d at 219 (finding "that the risks of physical force being exerted during the commission of the burglary of a vehicle are substantially similar to the risks of such force occurring while operating a vehicle without the owner's consent"). Further, the decision was based on hypothetical scenarios that assumed harm to property or persons not necessary to make out the elements of the offense. *Id.* (finding UUV "carries a substantial risk that the vehicle might be broken into, 'stripped,' or vandalized, or that it might become involved in an accident, resulting not only in damage to the vehicle and other property, but in personal injuries to innocent victims as well."). The

case was appealed, and certiorari was denied. 528 U.S. 837 (1999).

In short, the Fifth Circuit's holding ignores the history of the term and principles of *Leocal*. UUV should not be considered a "crime of violence," and the term — with its penalty of removal and future inadmissibility — should be reserved for serious offenses.

II. The Immigrant Community Has Repeatedly Challenged the Fifth Circuit's Holding, Resulting in the Waste of Judicial Resources

Over the last ten years, the Fifth Circuit has been asked to reconsider the determination that UUV is a "crime of violence." The Fifth Circuit has continually rejected these claims by noncitizens. The challenges by noncitizens have been costly to the litigants and the courts. Because a noncitizen does not have a right to court appointed counsel in the removal proceedings and potential appeals, the costs borne in challenging this incorrect application have been especially high. The Supreme Court should decide this case, and not return the case to the Fifth Circuit for more litigation when the Circuit has had ample opportunity to reconsider the precedent.

Although noncitizens have a right to counsel, there is no right to have an attorney provided if a respondent is in removal proceedings and cannot afford one. *See* 8 U.S.C. § 1362 (stating that during the removal hearing and appeal process "the person concerned shall have the privilege of being represented (at no expense to the Government) by

such counsel, authorized to practice in such proceedings, as he shall choose"). Accordingly, indigent noncitizens need to represent themselves in this complex area of law, to pay for counsel or to rely on the charity of attorneys and legal organizations. Most recently, the Department of Justice's Executive Office for Immigration Review ("EOIR") noted a "great concern" that a "large number of individuals [were] appearing *pro se*." FY 2007, Statistical Year Book at G1 (April 2008), *available at* http://www.usdoj.gov/eoir/statspub/fy07syb.pdf. Over half of the noncitizens in the United States appeared *pro se* between FY 2003 and FY 2007, navigating the proceedings without legal counsel. *Id.*

Because immigration law is administrative there are two proceedings before the noncitizen reaches the Federal Courts on an issue of law or a constitutional claim. *See* 8 U.S.C. § 1252 ("Nothing . . . in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section."). A litigant begins with the initial fact finding hearing before the Immigration Judge before then appealing to the Board of Immigration Appeals, to the Circuit Court (twice in the present case), and finally to the Supreme Court. These stages exacerbate the costs for all involved. By granting certiorari in this case and resolving this issue, the Court would conserve substantial private and public resources.

Moreover, it is unfair to continue to put the burden of litigating this issue on noncitizen petitioners. The determination that UUV is a "crime of violence" under 18 U.S.C. § 16(b) has been challenged by noncitizens since the first holding. *See e.g., United States* v. *Magallanes-Nieto*, 95 Fed. App'x 581, 582 (5th Cir. 2004), *certiorari denied* 543 U.S. 1004 (2004); *United States* v. *Vidal-Bouche*, 110 Fed. App'x 451 (5th Cir. 2004) (finding the "argument that Texas's UUMV offense does not constitute a 'crime of violence' under 18 U.S.C. § 16(b) is foreclosed"); *Ramirez* v. *Ashcroft*, 361 F. Supp. 2d 650, 657 (S.D. Tex. 2005) (finding UUV a "crime of violence" despite of *Leocal*); *De La Paz Sanchez* v. *Gonzales*, 473 F.3d 133, 135 (5th Cir. 2006) *cert. denied La Paz Sanchez* v. *Keisler,* 128 S. Ct. 354 (2007); *Brieva-Perez* v. *Gonzales*, 482 F.3d 356, 359 (5th Cir. 2007). These challenges have been continually rejected. If the Court denies certiorari, the burden will continue to be borne once again by the immigrant community and continue to tax the resources of the courts and the Department of Justice.

III. The Fifth Circuit's Decision Affects a Disproportionate Population Because Texas Holds a Large Percentage of Detained Noncitizens

The number of detention centers and detained noncitizens, has grown markedly in Texas over the last several years. As a result, the holding of the Fifth Circuit has a disproportionate effect in this context. As noted in Petitioner's brief, between November 2007 and November 2008 the Texas office

of U.S. Immigration and Customs Enforcement ("ICE") deported 53,370 people. *See* Juan Castillo, *Deportations from Central and South Texas Hit Record*, Austin-American Statesman, Nov. 7, 2008, at B1. Texas has become a central location for detention centers. Hernán Rozemberg, *Immigrant lockup expanding*, San Antonio Express-News, Sept. 26, 2007, at 1A (responding to former President Bush's plan to end "'catch and release' . . . [a]lready the country's largest immigration lockup, the Willacy County Detention Center for undocumented immigrants in Raymondville is slated to grow to 3,000 beds by early next year."); Forrest Wilder, *South Texas Hold 'em,* The Texas Observer, May 5, 2006, at 8 (noting a project to build a "2,800-bed detention facility near Laredo" aptly titled the "superjail."); Suzanne Gamboa, *Advocates decry detention "gold rush,"* The Associated Press State & Local Wire, Feb. 2, 2006 ("Some groups consider Texas 'ground zero' for what they call the immigration detention boom. The state has at least 7,000 recently built or proposed private prison beds for housing immigrant detainees for ICE or the U.S. Marshals.").

In short, the Fifth Circuit's erroneous holding that UUV is a "crime of violence" under § 16(b) is particularly damaging to the noncitizen community. This Court should grant certiorari to correct that error, resolve the Circuit split, and make clear that UUV is not a "crime of violence" under 18 U.S.C. 16(b).

CONCLUSION

For the reasons above, *amicus curiae* requests certiorari be granted.

Date: March 5, 2009

Respectfully submitted,

Nicolas Bourtin
Heather H. Volik
125 Broad Street
New York, New York 10004
(212)558-4000

Counsel for National Immigration Project
of the National Lawyers Guild